

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

EDWARD KELLY	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	Docket No. 18-cv-10305
v.	:	
	:	
MINDGEEK USA, Inc. D/B/A PORNHUB.COM, TRAFFICJUNKY INC. D/B/A TRAFFICJUNKY.COM, MINDGEEK S.À.R.L. D/B/A PORNHUB.COM, MG FREESITES LTD. and MG TECHNOLOGIES, LTD.	:	JURY TRIAL DEMANDED
	:	
Defendants.	:	

SECOND AMENDED COMPLAINT

Plaintiff, Edward Kelly, residing at 43 Dorchester Circle, Marlton, New Jersey 08053, by and through his attorney, Samuel B. Fineman, Esquire, of Cohen Fineman, LLC, by way of Second Amended Complaint against Defendants, MindGeek USA, Inc. d/b/a Pornhub.com (hereafter “Pornhub”), whose address is 2300 Empire Avenue, 7th Floor, Burbank, California 91504, Traffic Junky Inc. d/b/a trafficjunky.com (hereafter “Traffic Junky”), whose address is 777 boul Décarie Bureau 300, Montréal, QC, H4P 2H2 Canada, MindGeek S.à.r.l. d/b/a Pornhub.com (hereafter “MG Sarl”), whose address is 32, Boulevard Royal, L-2449 Luxembourg, Grand-Duchy of Luxembourg, MG Freesites Ltd. (hereafter “MG Freesites”), whose address is Block 1, 195-197 Old Nicosia-Limassol Road, Dali Industrial zone, Cyprus 2540 and MG Technologies, Ltd. (hereafter “MG Technologies”), whose address is Block 1, 195-197 Old Nicosia-Limassol Road, Dali Industrial zone, Cyprus 2540, alleges as follows:

FACTUAL BASIS OF CLAIM

1. Plaintiff, Edward Kelly, an adult individual, resides at 43 Dorchester Circle, Marlton, New Jersey 08053.

2. Defendant Pornhub is a corporation organized and existing under the laws of the State of Delaware and maintaining a business address of 2300 Empire Avenue, 7th Floor, Burbank, California 91504.

3. Defendant Pornhub has, as its registered agent, the Corporation Trust Co., whose address is Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

4. Defendant Traffic Junky is a Canadian company whose business address is 777 boul Décarie Bureau 300, Montréal, QC, H4P 2H2 Canada.

5. Defendant MG Sarl is a private limited liability company (société à responsabilité limitée) incorporated and existing under the laws of the Grand-Duchy of Luxembourg, having its registered office at 32, Boulevard Royal, L-2449 Luxembourg, Grand-Duchy of Luxembourg, registered with the Luxembourg Trade and Companies Register under number B 181 337.

6. Defendant MG Freesites is a registered Canadian corporation (Reg. No. 1167412239) whose registered address is Block 1, 195-197 Old Nicosia-Limassol Road, Dali Industrial zone, Cyprus 2540. On information and belief, MG Freesites has an interest in Pornhub.com.

7. Defendant MG Technologies, is a registered Canadian corporation (Reg. No. 1167596676) whose registered address is Block 1, 195-197 Old Nicosia-Limassol Road, Dali Industrial zone, Cyprus 2540. On information and belief, MG Technologies has an interest in Trafficjunky.com.

8. Pornhub is a pornographic video sharing website and the largest pornography site on the Internet at the homepage www.pornhub.com.

9. In 2017, Pornhub averaged 81 million visitors per day (28.5 billion visitors for the year), with 24.7 billion searches performed. That equates to 50,000 searches per minute or 800 per second.

10. Within the past six (6) years, Plaintiff's friend (hereafter referred to by his initials, "S.M."), who resides in Virginia, had visited the Pornhub site and discovered a photograph of Plaintiff (that was taken and owned by Plaintiff) displaying fanned-out cash in an advertisement promoted by Pornhub on its website. A true and correct copy of the Pornhub advertisement and a copy of Plaintiff's original photograph is attached hereto, made a part hereof and marked as Exhibit "A."

11. When S.M. confronted Plaintiff about the photograph, Plaintiff was dismayed and distraught.

12. Plaintiff had neither consented to nor sold his image to Pornhub for commercial use.

13. S.M.'s brother (hereafter referred to by his initials, "B.M.") independently discovered Plaintiff's photograph on the Pornhub website.

14. Plaintiff does not know how his photo was extracted and/or disseminated, but someone on Pornhub's advertising team and/or Traffic Junky's advertising team found the photo of Plaintiff and decided to use it in an ad campaign without Plaintiff's consent.

15. On information and belief, Traffic Junky is owned and controlled by Pornhub and/or its common owners and is used to generate, operate and run ads campaigns on Pornhub's network sites.

16. Plaintiff works in the private computer field and believes that anyone who viewed the advertisement on Pornhub could reasonably believe that Plaintiff intentionally consented to Pornhub's use of his image, an action deleteriously impacting his image by associating him with a known pornographic commercial operation.

17. On or about April 19, 2016, Plaintiff e-mailed Pornhub demanding that it address the fact that it had posted Plaintiff's image in an advertisement without his consent.

18. On or about April 19, 2016, a Traffic Junky employee named Chris Miller (whose e-mail address was miller@trafficjunky.com) sent an e-mail response to Plaintiff stating as follows: "I'm Chris Miller and I work for Traffic Junky, the company that manages the advertising for Pornhub. Whenever we have an issue where someone's picture has been used without their permission, we don't waste any time and always take the infringing ads down. The challenge for us will be to actually locate this ad within our database because if it did run in 2012, literally hundreds of thousands of ads have been uploaded since then so it'll be like finding a needle in a haystack. Typically we ask that you provide the image URL (right click on image and choose "copy image address"). This helps us find the ad within seconds and will allow us to identify which user uploaded it so we can advise them to discontinue its use. Would it be possible to get us this url?" A true and correct copy of said e-mail is made a part hereof, attached hereto and marked as Exhibit "B."

19. Plaintiff responded to Mr. Miller's inquiry by stating that he did not have the ad's URL. In response, Mr. Miller replied, "Hi Edward. Not having the URL will not deter us from trying to find the ad. I will just require some more info." A true and correct copy of said e-mail is made a part hereof, attached hereto and marked as Exhibit "C."

20. Despite having the information provided by Plaintiff, Defendants undertook no further efforts to locate the offending advertisement or respond to his grievance.

21. While Plaintiff does not have the URL of the ad depicting his image, there are similar ads that regularly appear on Pornhub. One such live ad can be found at <https://media.trafficjunky.net/ads/000/445/932/image445932.jpg>. A true and correct copy of said advertisement is made a part hereof, attached hereto and marked as Exhibit “D.”

22. On information and belief, the subject ad depicting Plaintiff likely appeared on Pornhub through a Traffic Junky ad campaign under ID No. 28442. It is unknown who the specific advertiser is.

23. On information and belief, Defendants should be able to identify the advertiser by looking up the ID number.

24. On information and belief, Defendants’ offending advertisement likely exists somewhere between ads 445926 and 445936 per said ID campaign.

25. Plaintiff has suffered emotional harm based upon Defendants’ violation of his privacy rights and usurpation of his common law right of publicity.

JURISDICTION AND VENUE

26. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the action is between citizens of different states and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

27. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this claim occurred in this judicial district.

FIRST COUNT
NEW JERSEY COMMON LAW RIGHT OF PUBLICITY

28. Plaintiff repeats the allegations in Paragraphs 1 to 27 as if set forth fully herein.

29. Plaintiff owns an enforceable right in his image which is depicted in the subject advertisement photograph.

30. Defendants' use of Plaintiff's image was unauthorized.

31. There is a significant likelihood that Defendants' unauthorized use of Plaintiff's image caused damage to the commercial value of his image.

WHEREFORE, Plaintiff, Edward Kelly, demands judgment against Defendants, MindGeek USA, Inc. d/b/a Pornhub.com, MindGeek S.à.r.l. d/b/a Pornhub.com, Traffic Junky Inc. d/b/a trafficjunky.com, MG Freesites Ltd. and MG Technologies, Ltd., jointly and severally, as follows:

A. Awarding Plaintiff, Edward Kelly, general compensatory damages in an amount in excess of \$1,000,000.00;

B. Awarding Plaintiff, Edward Kelly, infringer's profits in an amount in excess of \$1,000,000.00;

C. Awarding Plaintiff, Edward Kelly, damages for emotional harm in an amount in excess of \$1,000,000.00; and

D. Awarding Plaintiff such other and further relief as the court deems just and proper.

SECOND COUNT
UNJUST ENRICHMENT/QUANTUM MERUIT

32. The averments contained in Paragraphs 1 through 31 of this Complaint are incorporated herein by reference as though set forth in full.

18. On information and belief and as a result of the above conduct, Defendants received substantial benefit from the use of Plaintiff's image without giving consideration to Plaintiff for said use and was thus unjustly enriched.

WHEREFORE, Plaintiff, Edward Kelly, demands judgment against Defendants, MindGeek USA, Inc. d/b/a Pornhub.com, MindGeek S.à.r.l. d/b/a Pornhub.com, Traffic Junky Inc. d/b/a trafficjunky.com, MG Freesites Ltd. and MG Technologies, Ltd., jointly and severally, as follows:

A. Awarding Plaintiff, Edward Kelly, general compensatory damages in an amount in excess of \$1,000,000.00;

B. Awarding Plaintiff, Edward Kelly, infringer's profits in an amount in excess of \$1,000,000.00;

C. Awarding Plaintiff, Edward Kelly, damages for emotional harm in an amount in excess of \$1,000,000.00; and

D. Awarding Plaintiff such other and further relief as the court deems just and proper.

/s/Samuel B. Fineman

Samuel B. Fineman, Esquire
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Cherry Hill, NJ 08003
Attorney for Plaintiff, Edward Kelly

Dated: June 28, 2018